In The

Supreme Court of the United States

October Term, 1976

No. 76-363

AMSHU ASSOCIATES, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Second Circuit:

Petitioner, Amshu Associates, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered June 11, 1976, to enforce a certain order by the National Labor Relations Board, and that on hearing, judgment be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix 1) is not yet reported.

The opinion of the National Labor Relations Board 218 NLRB No. 127 (Appendix 2) affirming the decision of the Administrative Law Judge appears at page 3a, *infra.*

The opinion of the Administrative Law Judge, JD-172-75 (Appendix 3), finding that the petitioner has committed unfair labor practices appears at page 5a, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1976. This Court has jurisdiction under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

1. Whether it is a proper interpretation of Sections 2(6) and (7) of the National Labor Relations Act as amended [29 U.S.C. §§152(6) and (7)] to hold on the basis of the record below that Amshu Associates Inc. and Spring Valley Gardens Associates, a partnership, constitute a single employer engaged in commerce.

2. Whether it is a proper interpretation of Section 8(a)(1) of the National Labor Relations Act to hold, on the basis of the record below, that Thomas Hopkins was unlawfully interrogated and threatened on account of his union activity in violation of the Act.

3. Whether it is a proper interpretation of Sections 8(a)(3) and (1) of the National Labor Relations Act [29 U.S.C. §§158(a)(3) and (1)] to hold, on the basis of the record below, that Thomas Hopkins was discharged from employment in violation of the Act.

4. Whether it is a proper interpretation of Section 8(a)(1) of the National Labor Relations Act [29 U.S.C. §158(a)(1)] to hold, on the basis of the record below, that Elisha T. Carr was interrogated in violation of the Act.

STATUTORY PROVISIONS INVOLVED

§2 National Labor Relations Act (29 U.S.C. §152) Definitions

When used in this Act (29 U.S.C. §§151-158, 159-168) —

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

§7 National Labor Relations Act (29 U.S.C. §157) Rights of Employees

Employees shall have the right to self-organization, to form, join or assist labor

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all activities except to the extent that such right may be affected by an agreement.

§8 National Labor Relations Act (29 U.S.C. §158) Unfair labor practices

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 (29 U.S.C.S. §157)

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act (29 U.S.C.S. §§151-158, 159-168), or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in Section 8(a) of this Act (this subsection) as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 U.S.C.S. §159(a)], in the appropriate collective-bargaining unit covered by such agreement when

made and (ii) unless following an election held as provided in section 9(e) [29 U.S.C.S. §159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable ground for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

Cases numbered 2-CA-13401 and 2-CA-13422 were filed on the 2nd of August 1974 charging Amshu Associates Incorporated with violations of Sections 8(a)(1) and 8(a)(3) at an apartment complex named Sleepy Hollow Gardens owned by Amshu Associates Incorporated and a violation of Section 8(a)(1) at an apartment complex called Spring Valley Garden Apartments owned by Spring Valley Garden Associates. An order consolidating the cases, a consolidated complaint and a notice of hearing dated October 30, 1974 were served. Hearings on the matter took place on November 18th, 19th, December 12, 1974 and January 6th, 7th, 9th and 16th, 1975 before Sidney J. Barban, Administrative Law Judge, at 26 Federal Plaza in New York City.

The Administrative Law Judge's decision was issued March 31, 1975. The Administrative Law Judge made the following findings:

(a) the respondent (Amshu Associates Inc. and Spring Valley Gardens Associates) are each an employer, and together constitute a single employer, each engaged in commerce within the meaning of Sections 2(6) and (7) of the Act;

(b) the union is a labor organization within the meaning of Section 2(5) of the Act;

(c) by the discharge of Thomas Hopkins, respondent Amshu discriminated in regard to the hire or tenure of employment of an employee discouraging membership in and activities on behalf of labor organizations, which unfair labor practices violates Sections 8(a)(1) and (3) of the Act;

(d) respondent Amshu, by interrogation of and threatening to terminate Thomas Hopkins because of his union activities, engaged in unfair labor practices which violated Section 8(a)(1) of the Act;

(e) respondent Spring Valley Associates, by interrogation of Elisha T. Carr concerning his union activities, engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act;

(f) the above unfair labor practices are practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

An order transferring the proceeding to the National Labor Relations Board was issued dated March 31, 1975.

An order confirming the Administrative Law Judge's decision was issued by the National Labor Relations Board dated June 25, 1975. The order confirmed the findings of the Administrative Law Judge.

An application by the National Labor Relations Board for enforcement was made to the United States Court of Appeals, Second Circuit, dated October 17, 1975 and filed October 24, 1975.

Argument before the United States Court of Appeals, Second Circuit was heard on April 20, 1976 and a decision confirming the order of the National Labor Relations Board was handed down from the bench.

An application dated June 2, 1976 was made by the National Labor Relations Board to the United States Court of Appeals, Second Circuit for leave to file its proposed judgment after its time had expired. The application was granted June 10, 1976. The judgment was filed June 11, 1976. Jurisdiction for a United States Court of Appeals to enforce an order of the National Labor Relations Board is conferred by 218 NLRB No. 127 (Appendix 2).

We seek to review the order and adjudication by the United States Court of Appeals for the Second Circuit to enforce the said order of the National Labor Relations Board in the above proceedings, and outright reversal of such decision.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Second Circuit was in error in that it should have refused to enforce the order of the NLRB directing the petitioner to rehire one Thomas Hopkins, to pay Thomas Hopkins back wages and to pay costs, because the decision upon which the order was based is contrary to the law set forth in *Universal Camera v. NLRB,* 340 U.S. 474 (1951), 71 S. Ct. 456. Question is presented through this case "What degree and quality of proof does an employer need in order to overcome an accusation that, where an employee was fired, it was because of anti-union animus?" The employer-petitioner placed an advertisement in the newspaper in March of 1974 for a resident superintendent for its garden apartments. The government's own witness admitted that she and her husband were interviewed for the job of resident superintendent at Sleepy Hollow Gardens in early June of 1974. Replacement

for Thomas Hopkins, Simon Wizman, was hired in mid-June. All these facts, clearly establishing employer's firm decision to fire Thomas Hopkins took place before Hopkins, by his own admission, first contacted the union on June 24, 1974. A union official, Childers, admitted on the record that the employer's immediate response on first learning that Hopkins had joined the union was that Hopkins had already been replaced because he was not living on the premises with his wife. His replacement commenced work on July 1st, 1974.

The finding that Thomas Hopkins was discharged from employment in violation of Sections 8(a)(3) and (1) of the Act should be set aside by this Court in accordance with its decision in *Universal Camera, supra,* because "it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

II.

A finding that Thomas Hopkins was unlawfully interrogated and threatened on account of his union activity was in violation of Section 8(a)(1) of the Act relies upon "suspicion, surmise, implications, or plainly incredible evidence" in derogation of this Court's opinion in the *Universal Camera* case, *supra.* With the decision to fire Hopkins having been clearly established prior to this time, with the union having already been informed of the decision to fire Hopkins before this time, the statements that the employer's representative was alleged to have made, *i.e.,* "I see you joined the GD union" and "well you won't be around here very long." In the course of a conversation but a few minutes in length, stands not only as improbable, but could hardly have constituted an interference, restraint or coercion which is required under the Act.

III.

It is in error to hold that the following conversation between Bleiberg, a representative of the employer-petitioner and one Elisha T. Carr was a violation of Section 8(a)(1) of the Act:

> "I was working in the courtyard there, and Mr. Bleiberg came up to me and asked me 'did you join the union?' so I said, 'no.' He said 'I heard you did.' I said, 'I signed a card for the union.' He said, 'Oh' and walked away."

The record contains no circumstances which would color the above language in a more sinister light than appears on its face. Such a conversation would be permissible under Section 8(c) [29 U.S.C. §158(c)] of the Act which permits:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [29 U.S.C. §151-158, 159-168], if such expression contains no threat of reprisal or force or promise of benefit."

To hold otherwise is contrary to the holding of the Court of Appeals for the Second Circuit in the *J.J. Newberry Company v. NLRB* case, 442 F.2d 897 (C.A. 2, 1971), where the court held that interrogation, not itself threatening, is not an unfair labor practice unless fairly severe standards are met including such areas as background, nature of the information sought, identity of the questioner, and the place and method of interrogation and the truthfulness of the reply.

IV.

It was in error to find that Amshu Associates Inc. and Spring Valley Garden Associates, a partnership, constituted a single employer engaged in commerce under Sections 2(6) and (7). The issue presented is an important one for the apartment industry. Shareholders or partners in apartment A may be substantially similar to shareholders or partners in apartment B which in turn may be substantially similar to the shareholders or partners in apartment C, et cetera, through apartment E whereas none of the shareholders or partners in apartment E need be necessarily the same as in apartment A. Managing agents are also used to manage apartments or complexes having no interconnecting ownerships whatsoever. It would be a hardship on the industry if under the facts of this case the partners in the Spring Valley Gardens were held to be a common employer for the purpose of the Act with the shareholders of Sleepy Hollow Gardens.

Amshu Associates Inc. has seven shareholders while Spring Valley Gardens Associates has nine partners. Not all of the shareholders in Amshu are partners in Spring Valley Gardens. Employees at the separate locations receive different wages and different benefits, decisions for hiring and firing, for wages and for working conditions are made on a case by case basis by the shareholders or partners of the respective entities, each maintains separate renting facilities at different locations, bookkeeping, banking, payrolls and financing of the two companies are kept entirely separate.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit to enforce the order of the National Labor Relations Board ordering the reinstatement to employment, back wages and costs against the petitioner and supporting the findings of the National Labor Relations Board that the petitioner has committed unfair labor practices and is a single employer for the purpose of the Act with Spring Valley Gardens Associates should be reversed. For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Raymond G. Kruse

BRENT, PHILLIPS,
DRANOFF & DAVIS
Attorneys for Petitioner

APPENDIX 1 — OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMSHU ASSOCIATES, INC.,

Respondent.

No. 75-4231

United States Court of Appeals
Filed
June 11, 1976
A. Daniel Fusaro, Clerk
Second Circuit

JUDGMENT

Before: FRIENDLY, HAYS and MULLIGAN, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Amshu Associates, Inc., Spring Valley, New York, its officers, agents, successors, and assigns on June 25, 1975. The Court heard argument of respective counsel on April 20, 1976, has considered the briefs and transcript of record filed in this cause, and at the conclusion of oral argument, handed down its decision granting enforcement of the Board's Order.

Appendix 1

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Second Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Amshu Associates, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said Order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

s/ Henry J. Friendly
Judge, United States Court of Appeals for the Second Circuit

s/ William H. Mulligan
Judge, United States Court of Appeals for the Second Circuit

FILED: June 11, 1976

APPENDIX 2 — OPINION OF NATIONAL LABOR RELATIONS BOARD

218 NLRB No. 127 FKP

D—74
Spring Valley, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMSHU ASSOCIATES, INC., AND SPRING VALLEY GARDEN ASSOCIATES

and

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32E, AFL—CIO

Cases 2—CA—13401 and
2—CA—13422

DECISION AND ORDER

On March 31, 1975, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent Amshu Associates, Inc., Spring Valley, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order.

Dated, Washington, D.C.
June 25, 1975

John H. Fanning, Member

Ralph E. Kennedy, Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX 3 — OPINION OF ADMINISTRATIVE LAW JUDGE

JD-172-75
Spring Valley, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

AMSHU ASSOCIATES, INC., and SPRING VALLEY GARDENS ASSOCIATES[1]

Respondents

and

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32E, AFL-CIO

Charging Party

Haywood E Banks, Esq., for the General Counsel.

Raymond G. Kruse, Esq., Spring Valley, N.Y., for the Respondents.

Case No. 2-CA-13401
Case No. 2-CA-13422

1. The caption is as set forth in Respondent's brief. The complaint was originally issued only against Amshu Associates, Inc. (herein "Amshu"). Respondents' counsel contended that the matters involved in Case No. 2-CA-13401 pertain to an employee employed by Amshu but that Case No. 2-CA-13422 pertains to an employee employed by Spring Valley Gardens Associates (herein "Spring Valley Associates"). Counsel asserted that he was authorized to represent Spring Valley Associates as well as Amshu, and agreed that the trial should proceed as if the charge and complaint in Case No. 2-CA-13422 had been duly filed against and served upon Spring Valley Associates. The relationship between the two employers will be considered hereinafter.

Appendix 3

DECISION

Statement of the Case

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at New York, New York, on November 18, 19, December 12, 1974, and January 6, 7, 9, 16, 1975. The Order Consolidating Cases and Consolidated Complaint was issued on October 30, 1974 (based upon a charge filed in Case No. 2-CA-13401 on August 2, 1974, and upon a charge filed in Case No. 2-CA-13422 on August 22, 1974). As developed at the hearing, the consolidated complaint alleges (pursuant to the charge in Case No. 2-CA-13401) that Mark Weidman,[2] vice president of Amshu, interrogated its employee concerning union activities, and threatened discharge and other reprisals if the employee engaged in union activities, and that Respondent Amshu discharged Thomas Hopkins because of his union or other concerted activities, in violation of Sections 8(a)(1) and (3) of the Act, and (pursuant to the charge in Case No. 2-CA-13422) that David Bleiberg, an agent of Spring Valley Associates, interrogated an employee concerning his union activities in violation of Section 8(a)(1) of the Act. Respondents' answer denies the commission of the unfair labor practices alleged.

Upon the entire record in this case, from observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel, and the Respondents, I make the following:

Findings and Conclusions

I. The Operations of Respondents

Respondent Amshu is a New York corporation with its main offices located at Woodbridge, New Jersey.[3] It is engaged

2. Incorrectly spelled "Wideman" in the transcript.

3. Also referred to as Newbridge and Woodridge in the transcript.

Appendix 3

in the construction and operation of certain apartment developments. One of these developments, located in Spring Valley, New York, is known as Sleepy Hollow Gardens. Amshu also owns and operates a high-rise condominium located nearby. The shareholders and officers of Amshu are the following: Sam Halpern, president, Mark Weidman, vice president, Harry Wilf, secretary, Meyer Gold, Jacob Burstyn (one or the other is treasurer), Arie Halpern, Joseph Wilf.

Respondent Spring Valley Associates is a partnership, with its main office located at Woodbridge, New Jersey, in the same place as Respondent Amshu. The partners are: Sam Halpern (referred to as the senior partner), Mark Weidman, Harry Wilf, Meyer Gold, Jacob Burstyn, Leonard Wilf, Frederick Halpern. It is engaged in the construction and operation of certain apartment developments. One of these, located in Spring Valley, New York, known as Spring Valley Gardens, is about a mile and a half from Sleepy Hollow Gardens.

Labor policy for both Amshu and Spring Valley Associates is made in New Jersey basically by the same persons, and transmitted by Sam Halpern to Mark Weidman, who executes that policy for both Respondents with respect to their operations in Spring Valley, New York, which are the only operations involved here. Both Respondents utilize the same office staff in New Jersey[4] and apparently interchange managerial personnel in Spring Valley. David Bleiberg, admittedly a supervisory agent of Spring Valley Associates during times material to this matter, testified that he was transferred by the main office in New Jersey from Spring Valley Gardens to Sleepy Hollow Gardens where he was employed by Amshu. He stated that he considered the two

4. Mark Weidman testified that a number of other companies utilize the same staff at the same location. In the absence of any other evidence, the record would lead me to believe that these other companies likely involve many of the same persons involved with Respondents. Thus it is noted that another company involved in the Spring Valley operations, Spring Valley Gardens, Inc., composed of many of the persons previously named, served as the intermediary for Spring Valley Associates in the purchase of property for the apartments.

employers to be the same. Also, William Leflein, who, in his capacity as Assistant Vice President of Amshu, signed a letter notifying Thomas Hopkins of his discharge, it is also mentioned by Elisha Carr, an employee of Spring Valley Associates, as giving him assurances as to his job status.

It is admitted that Amshu and Spring Valley Associates each in the operation of the Sleepy Hollow Gardens complex and the Spring Valley Garden apartment complex respectively, derive gross revenues from said apartment complexes on an annual basis in excess of $500,000, and that each caused goods and materials of a value in excess of $50,000 in a recent annual period to be transported in interstate commerce to its respective apartment development in Spring Valley. It is admitted that both employers are engaged in commerce within the meaning of the Act.

Based upon the above, and the entire record in this matter, it is found that Amshu and Spring Valley Associates for the purposes of this proceeding constitute a single employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

II. Labor Organization

It is admitted, and I find that Building Service Employees International Union, Local 32E, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. Summary of Facts and Issues

a. The conditions of employment

In September 1973, while Sleepy Hollow Gardens apartments were still under construction, and before any tenants had moved in, Thomas Hopkins applied for the position of resident superintendent in response to an advertisement for the

position. Accompanied by his wife, Hopkins was interviewed and hired by David Halpern, then associated with Amshu as a builder. The arrangements with Hopkins are of some significance. At the outset, he was to assist the builders in finishing up the work, and preparing individual apartments for occupancy. As tenants began to come in, Hopkins' assistance to the builders diminished and his responsibilities for tenants' complaints increased. Occupancy by tenants began in late September or October. By July 22, 1974, when Hopkins was terminated, there were 100 tenants at the Sleepy Hollow Gardens apartments.

Hopkins was assigned a regular 8-hour work day, 5 days a week, but it was understood that he would be available to take care of emergency complaints from tenants 24 hours a day, 6 days a week.[5] To facilitate this, Hopkins was given an apartment in the development as part of his compensation. It was understood that the position required a resident superintendent, and although I am convinced that the matter was not specifically discussed when Hopkins was employed, there is no question but that he understood that Amshu expected his wife to move into the apartment with him. As Hopkins himself stated, "My wife has been with me the 26 years I have been a super, . . . and I won't at this stage of the game be without her. I don't think I or any other super could run a new building without his wife there." Thus, among other things, the resident superintendent's wife is available to take calls and relay messages when the superintendent is necessarily absent.

b. The residency issue

One of the principal reasons assigned by Amshu for the discharge of Hopkins is its assertion that Mrs. Hopkins did not

5. Hopkins' day off from September 1973 to the latter part of December was Sunday. This was changed to Wednesday in January, February and March, then to Saturday for a very short time, and then back to Sunday from April until Hopkins was discharged. Significantly, on Hopkins' day off, Amshu did not provide a replacement to

(Cont'd)

move into the apartment with her husband as expected. Amshu asserts, and Hopkins denies, that management frequently complained of this to him. Hopkins, his wife, and other supporting witnesses testified that Mrs. Hopkins moved into the apartment with her husband shortly after her husband was hired and lived there with him until his discharge. Respondent Amshu's management and other witnesses, however, gave testimony to the effect that Mrs. Hopkins did not live in the Sleepy Hollow Gardens apartment, but apparently resided at a home in Yonkers, New York, owned by Hopkins and occupied by their son. Amshu additionally asserts that Hopkins also stayed at the Yonkers home in the evening, and thus was unavailable for emergency calls from tenants. To the contrary, Hopkins, his wife and son testified that Hopkins and his wife visited the Yonkers home only on Hopkins' day off.

In support of its contention that Hopkins and his wife were not living at Sleepy Hollow Gardens, Amshu adduced considerable testimony to the effect that there was little furniture in the apartment, no bedroom furniture, and there was an array of tools, materials and appliances (to be installed by Hopkins in apartments as they became tenanted) stored in Hopkins' apartment, which indicated that the apartment was not being lived in on a regular basis. Hopkins, his wife, and other supporting witnesses. on the other hand, testified that the apartment contained a full set of bedroom furniture, as well as some other furniture.[6] Hopkins explained that he kept tools and appliances (which he was expected to install) in his own apartment for security and convenience, since Amshu did not provide him with a secure workshop until May 1974. Hopkins asserts that his wife complained of the condition of the apartment.

(Cont'd)
service the tenants' complaints. It was also understood that Hopkins could take time off during the evening for personal reasons, so long as these occasions were not too frequent or extended.

6. Mrs. Hopkins attributed the meagreness of the livingroom and dining furniture to the fact that their possessions had recently been burned.

c. Union activities involving Amshu and Spring Valley Associates

Shortly before June 24, 1974 (all dates hereinafter in 1974, unless otherwise noted), Hopkins had a conversation with Weidman, the vice president of Amshu, in which Hopkins complained that he needed assistance in covering his job. Weidman stated that Amshu could not afford it.[7] Hopkins stated that this induced him to go to the Union on June 24 to sign up (he had been carrying a withdrawal card from the Union for a long time). On the same date, the Union sent Amshu a letter advising that the employees at Sleepy Hollow Gardens had designated the Union as their bargaining representative, and requested bargaining. On the following day, June 25, Weidman and the Union attended a proceeding before the New York State Labor Relations Board, apparently a representation proceeding involving Spring Valley Gardens. The Union having also filed a petition with the State Board for certification at Sleepy Hollow Gardens, Kenneth L. Childers, a business agent of the Union, sought to have Weidman agree that the two proceedings should be held together. Upon Childers' informing Weidman that Hopkins had signed up with the Union, Weidman replied that he intended to discharge Hopkins because "he is not living there. He didn't move in." Childers warned Weidman not to do this. Weidman asserts that after making a telephone call during this period, Childers said he had found out that Hopkins was not living at Sleepy Hollow apartments. Childers denied this. I credit Childers.[8] During this same conversation, Weidman threatened to dock the pay of George Schmidt, the resident superintendent

7. Amshu asserts that during the period of Hopkins employment, he was given certain assistance. The issue seems significant with respect to the assessment of credibility problems, and has been duly considered for that purpose.

8. In the absence of any explanation therefor, I would find the conduct attributed to Childers by Weidman unusual for an experienced union representative in the circumstances. Further, as discussed hereinafter, I am convinced that Hopkins was in fact residing at the Sleepy Hollow Apartments at the time, and have no reason to believe that Childers was informed otherwise.

at Spring Valley Gardens, for attending the State Board hearing. Apparently at the intervention of the attorney for Spring Valley Associates, Weidman decided not to dock Schmidt's pay.

Prior to this time, at Spring Valley Gardens, Elisha T. Carr, an employee of Spring Valley Associates who was assigned to assist Superintendent George Schmidt signed a card for the Union and turned it over to Schmidt's wife. Thereafter, according to Carr, David Bleiberg, then a supervisory agent of Spring Valley Associates, came to Carr, and asked, "Did you join the Union?" When Carr denied this, Bleiberg stated that he had heard that Carr had joined the Union. Carr replied that he had signed a card for the Union. Bleiberg said, "Oh," and walked away. Within 3 weeks, Carr and another employees were laid off. (General Counsel refused to issue a complaint on the Union's charge that Carr's layoff was in violation of the Act.) Bleiberg denied Carr's testimony. I credit Carr.[9]

According to Hopkins, about 3 or 4 days after he "joined the union," he saw Weidman near Hopkins' workshop, at which time Weidman said, "I see you joined the GD (G-d damn) union," to which Hopkins assented. Hopkins says that Weidman replied that Hopkins would not be "around here very long." When Hopkins stated that the Union said Weidman could not fire him, Weidman then said, in Hopkins' words, "Well, we will find some way to get rid of you." This is denied by Weidman. I have very carefully considered this conflict in light of the demeanor of the witnesses and the record as a whole. In particular, it is noted that the remarks attributed to Weidman here are consistent with the animus exhibited by Weidman against Schmidt at the State Labor Board hearing and with remarks made by Weidman to Serur, a job applicant, as

9. On the record as a whole I am convinced that Respondents have a strong antipathy to the Union. Bleiberg's conduct is consistent with the pattern of employer action found herein. Carr apparently appeared at the hearing under the compulsion of a subpena. His testimony did not apparently serve any self interest. His testimony evidenced no indication of bias or distortion.

considered hereinafter. On the basis of this consideration, I credit Hopkins as to this conversation.

d. Events leading to the discharge of Hopkins

1. Complaints about Hopkins

Respondent Amshu contends that it had decided to discharge Hopkins long before he signed up with the Union because of complaints about Hopkins from tenants directly and through the office of the local building inspector, and because Hopkins and his wife were not living at the apartment and thus not readily available to handle complaints. Weidman and Halpern assert that on a number of occasions they were compelled to call Hopkins at his home in Yonkers to respond to emergency calls. Hopkins states that this occurred on 2 or 3 occasions, but only when he was at Yonkers on his day off.[10] According to Weidman, "the final decision [to discharge Hopkins] was made *in May* (emphasis added) when Mr. Long, the building inspector of Spring Valley, complained to me personally, that this thing is getting out of hand; the tenants are complaining to the building department that there was no coverage . . . I told [Hopkins] that this could not go on any more like this, that he has to reside there, he has to live there; we cannot stand the complaints of having the building department on our back." (This was denied by Hopkins, who asserted that he had no indication that his work was unsatisfactory until he was advised of his termination, and, in fact, had been complimented on his work by Halpern, who was his immediate supervisor. Hopkins, indeed, had received a wage raise in May.) Weidman stated that the complaints from the building department were the last straw that "broke the camel's back." However, evidence of specific incidents in support of these

10. I have particularly noted that the record shows that it was Hopkins who gave Respondent the telephone number at his Yonkers home, indicating that he told Respondent that he would be visiting there. This tends to support the contention that the visits were on Hopkins' day off.

general assertions are sparse. Weidman states he has a specific recollection of a call from the building inspector in May stating complaints from tenants, but recalls no details. He has some vague recollection of the possibility of another call. Halpern recalled several calls from the building inspector relaying complaints from tenants, the last such call occurring in April. The contents of these calls were not stated, although Halpern indicated that in the winter months there were problems with the boilers in the apartments concerning which he had to call Hopkins at Yonkers. It appears that on these occasions, which Hopkins states occurred only on his days off, Hopkins immediately returned to the apartments to deal with the emergency. Weidman states that he received no calls from tenants directly, but that he was advised by Halpern that the latter received calls at night from tenants complaining about coverage by Hopkins. Halpern referred specifically only to one tenant who called complaining that screens had not been put in his apartments.

A number of tenants were called as witnesses by Amshu and by the General Counsel. From their testimony it would appear that they had a number of problems with the apartments. A frequent complaint concerned the operation of the boilers and the availability of heat and hot water during the winter months. There is evidence that Hopkins took care of a number of these complaints, and, in fact, was available to restart the boiler on several occasions in the evening and during the middle of the night. There is evidence that there were occasions when tenants were unable to reach Hopkins to take care of problems, but no showing that these occurred on days when Hopkins was supposed to be on duty. Two tenants testified that they had complained to the building department. One tenant testified on direct examination that "after a couple of times when we could not get in touch with the superintendent, I sent a letter out to the building department of Spring Valley complaining about this." On cross-examination, after detailing his many complaints about

not having screens in his apartment (Hopkins had advised that they were coming in and the tenant says he couldn't blame him), the tenant states that he then "finally got in touch with the building department, because it was warm in April, and we had no screens. . . ." The second tenant complained to the building department concerning an emergency incident which apparently occurred on Hopkins' day off.[11] There is no other evidence of complaints to the building department. The building inspector was not called as a witness, and no explanation was offered as to his unavailability.

2. Attempt to hire a new superintendent

In March, Amshu placed an advertisement in a local newspaper in Nyack, the Journal-News, for "Superintendent-Resident Garden Apartments". No address was given. The telephone number listed was that of the Amshu office in its condominium. The ad apparently ran for about one week. Neither Weidman nor Halpern were very clear concerning the responses received to this ad. Halpern and Weidman assert that this ad was intended to secure a replacement for Hopkins, thus showing an intent to terminate Hopkins before his union activities began.

Halpern interviewed Abraham Serur, together with his wife Lea, for a position as superintendent either in response to this ad, or because Serur had learned of the position through others. Halpern states that this was for the position then occupied by Hopkins, because Amshu was concerned that Mrs. Hopkins was not going to move into the apartment. Halpern says that the Serurs were called back for another interview. This was in early June. At that time they met with Weidman. According to the credited testimony of Lea Serur, Weidman told the Serurs that the job was not then open, but that he would call them when it became open, that Amshu was having trouble with "the old

11. The tenant couldn't recall if the incident occurred on June 16 (Sunday) or on June 17 (Monday). Hopkins recalled being off on that Sunday.

super," "[t]hat the super took them to court, because he's in the union." Weidman took the Serurs to see the Sleepy Hollow apartment complex and the hi-rise condominium located nearby. It does not seem that either Halpern or Weidman told the Serurs the name of the apartment group for which Amshu was seeking a superintendent. Halpern advised them that it was in Spring Valley. The Serurs told Weidman that they could not be available to take a position until they returned from Canada in the early part of July. Upon their return from Canada, the Serurs spoke with Weidman by phone. At that time he advised that the position was not yet open "because they are fighting with the old super." The Serurs have not been contacted by Weidman since that time.

Weidman testified that he interviewed a Mr. Weisman for the position of superintendent; "I think I interviewed him the early part of June; I would say the second week of June, two or three weeks — June 10, I believe it was." Weidman states that Weisman said that he could not be available before the end of June, and actually started to work on July 1. Hopkins was told that Weisman was to be his helper.

By letter dated July 8, signed by William Leflein for Amshu, Hopkins was advised:

> Prior to the time you were employed in September 1973, you were informed that your position would be one of resident superintendent. You were given, at considerable cost to us, apartment No. 20 Luney Court, and you told us, prior to being employed, that you would, in fact, move in with your family upon commencing work.
>
> Since that time, we have continually demanded that the move into the apartment be made

> because your availability at the building is imperative for its efficient and safe operation.
>
> It having become apparent that you have no intention of residing at the building, it has been necessary to replace you with a new superintendent who will reside on the premises.
>
> You will be relieved effective July 22, 1974.

In accordance with this letter, Hopkins did leave the premises by July 22. Within a week thereafter, Hopkins' son Robert, together with Alexander Rizzo, a business partner of Robert Hopkins, moved Hopkins' bedroom furniture from the apartment to Hopkins' house in Yonkers. It appears that the rest of Hopkins' effects remained in the apartment at the time of the hearing in this matter.

While the above summary statement sets forth only the essential facts of the case, without expounding in detail the testimony of the 22 different witnesses who testified (some of them more than once), the testimony of each of them has been carefully considered, including the conflicts among the witnesses and the conflicts in the testimony of individual witnesses. To the extent that the testimony of any witness is inconsistent with the findings made in the following Analysis and Conclusions, that testimony has not been credited.

IV. Analysis and Conclusions

I credit the testimony of Mr. and Mrs. Thomas Hopkins that they moved into the Sleepy Hollow apartments shortly after Hopkins was employed as resident superintendent there and made that place their residence until Hopkins was discharged. I find this conclusion to be supported by the credible testimony of Alexander Rizzo, the business partner of the Hopkins' son

Robert. I was particularly impressed with Rizzo's testimony that he picked up Mrs. Hopkins in the morning at the Sleepy Hollow apartments several times a week during the material period to take her to the business run by Rizzo and Robert Hopkins, where Mrs. Hopkins worked on a fairly regular basis, and that Rizzo left Mrs. Hopkins off at the apartments in the evening of the days that she worked at her son's business.

Hopkins seems to have had a long career as a resident superintendent in the New York area and is an experienced and apparently stable person. It is difficult to believe that a man who has made this field a lifetime work would at this stage of his career take a position clearly requiring his presence at the apartments and then deliberately absent himself continually, in spite of repeated admonitions indicating that such conduct was jeopardizing his position, as Respondent Amshu claims. Nor am I able to ascertain any motivation that would have induced Hopkins and his wife to live in their house in Yonkers distant from Hopkins' work, when living quarters, without cost, were provided at the place of his employment, which quarters were convenient and necessary to his work.

The record as a whole convinces me that Respondent Amshu was concerned that Hopkins had a house in Yonkers only because Hopkins consistently went there on his days off, whereas, if Hopkins remained at his residence at Sleepy Hollow Gardens, he would have been available for emergencies occurring there on Hopkins' day off. Respondent provided no substitute for Hopkins on his days off, and I have no doubt that the major problems of lack of maintenance coverage about which Amshu now complains occurred on Hopkins' days off.

It may be that on some occasions Mr. and Mrs. Hopkins, or one of them, were not at home at their apartment in the evening. But Respondent does not claim that they were obligated to remain on the premises continuously. I did get the

strong impression from the testimony, reinforced by my study of the record, that the complaints against Hopkins, largely unspecific, were exaggerated.

However, even if Respondent Amshu discharged Hopkins for not residing at Sleepy Hollow Gardens on his days off — which might be considered an arbitrary action — this nevertheless would not constitute a violation of the Act, if, in fact, this were the real reason for the discharge. I find that it was not.

Respondent Amshu, asserting that Hopkins' discharge was unrelated to his union activities occurring about June 24, relies strongly upon its advertisement in a local paper in March for a resident superintendent. Amshu asserts that this ad was placed pursuant to its decision to discharge Hopkins. One of those applicants interviewed in March and again in early June for the position, according to Amshu, was Abraham Serur. However, Mrs. Serur, who accompanied her husband to these interviews, credibly testified that she and her husband were told that Amshu was looking for a replacement for one of its superintendents who was giving it trouble because of the Union, and was taking it "to court" in such a matter. Considering that this interview apparently occurred before Hopkins signed with the Union, the position Amshu desired to fill was clearly one other than Hopkins'.[12]

In addition, Amshu's contention that the decision to get rid of Hopkins was made in March, prior to the placing of the advertisement, is at variance with the testimony of Weidman, vice-president of Amshu, that the precipitating cause for that decision occurred in May, after an alleged complaint from the building Department of Spring Valley about lack of maintenance coverage at the Sleepy Hollow Gardens apartments.

12. The record shows union activity at Spring Valley Gardens prior to June 24. When this started is not revealed.

Appendix 3

Weidman further contends that he interviewed and hired a replacement for Hopkins, Weisman, on June 10, prior to the time Hopkins signed with the Union, on June 24. But Weisman did not begin work until July 1, then as Hopkins' assistant, and Weisman's testimony as to the date he interviewed and hired Weisman did not express that certainty and definiteness that would inspire confidence in the accuracy of the date. No other support is offered for this date. Weisman, who apparently is still employed by Amshu, was not called to testify.

I am convinced on the basis of the above, and the record as a whole, that whatever difficulties Respondent Amshu considered it was having with Hopkins, it had been willing to tolerate them and had made no decision to discharge him until it learned that Hopkins had joined the Union, which I find was the straw that broke the camel's back. The reasons presently offered for his discharge I find are pretexts. This is supported by Hopkins' credible testimony that Weidman told him that as a result of Hopkins' joining the Union, he would not be around there very long, and that Weidman would find some way to get rid of Hopkins.

On the basis of the above, and the entire record, I find that Respondent Amshu, by discharging Thomas Hopkins, discriminated in the hire or tenure of an employee in violation of Section 8(a)(1) and (3) of the Act. It is further found that Respondent Amshu, by Weidman's interrogation of Hopkins concerning his union activities and by the threat to terminate Hopkins because of those activities, further violated Section 8(a)(1) of the Act.

It is further found that in the circumstances of this case, Respondent Spring Valley Associates violated Section 8(a)(1) of the Act by David Bleiberg's interrogation of Elisha Carr concerning his union activities.

Appendix 3

Conclusions of Law

1. The Respondents are each an employer, and together constitute a single employer, each engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the discharge of Thomas Hopkins, Respondent Amshu discriminated in regard to the hire or tenure of employment of an employee discouraging membership in and activities on behalf of labor organizations, which unfair labor practices violate Sections 8(a)(1) and (3) of the Act.

4. Respondent Amshu, by interrogation of and threatening to terminate Thomas Hopkins because of his union activities, engaged in unfair labor practices which violated Section 8(a)(1) of the Act.

5. Respondent Spring Valley Associates, by interrogation of Elisha T. Carr concerning his union activities, engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

6. The above unfair labor practices are practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

It having been found that Respondent Amshu has engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act, it will be recommended that Respondent Amshu be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Appendix 3

It having been found that Respondent Amshu unlawfully discharged Thomas Hopkins, it will be recommended that Respondent Amshu offer him immediate and full reinstatement to his former job, or if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights, privileges, or working conditions, and make him whole for any loss of earnings suffered by reason of such discrimination against him, from the date of his discharge to the date of Respondent Amshu's offer to reinstate him as aforesaid, less his net earnings during that period, in accordance with the Board's formula set forth in *F.W. Woolworth Company,* 90 NLRB 289, with interest thereon at the rate of 6 percent per annum, as set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 274.

The particular circumstances of this case make it questionable whether it would be appropriate to order Respondent Amshu to post notices to the employees, inasmuch as it does not appear that Respondent maintains a place of business regularly frequented by its employees. It will therefore be recommended that Respondent Amshu mail copies of the notice hereinafter provided to each of its employees engaged at any of its activities in Spring Valley, New York, and furnish proof of such mailings, with the names and addresses of the persons to whom the notices were mailed, and the dates of the mailings, to the Regional Director for Region 2 of the Board within 5 days after the mailings hereinafter provided.

Although it has been found that Respondent Spring Valley Associates engaged in a single instance of unlawful interrogation of an employee, I do not believe that it is necessary to effectuate the purposes of the Act that a remedial order be issued against that Respondent in the circumstances. Notwithstanding the close connection between Respondent Amshu and Respondent Spring Valley Associates, there appears to have been a minimum amount of contact between employees of their separate

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operations in Spring Valley. The supervisor who engaged in the single incident of interrogation apparently no longer works for Respondent Spring Valley Associates. The employee interrogated was not unlawfully terminated, so far as this record shows, nor does the record show that any other employee of that Respondent has been interfered with in the exercise of his rights under the Act. I recommend that no remedial order be issued against Respondent Spring Valley Associates.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I issue the following recommended:[13]

ORDER

Amshu Associates, Inc., Respondent herein, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against employees in order to discourage membership in or support of Building Service Employees International Union, Local 32E, AFL-CIO, or any other labor organization.

(b) Threatening employees with discharge, or other reprisals for joining a union or engaging in union activities or supporting a union.

(c) Coercively interrogating employees concerning employee membership in or activities on behalf of unions.

(d) In any other manner interfering with, restraining,

13. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Thomas Hopkins immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent job, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, in accordance with the provisions of the section entitled "The Remedy" above.

(b) Preserve and make available to the Board, or its agent, upon request, payroll and other records to facilitate the effectuation of the Order herein.

(c) Mail to each of its employees engaged at any of Respondent's activities in Spring Valley, New York, a copy of the attached Notice marked "Appendix."[14] Copies of such Notice, on forms provided by the Regional Director for Region 2, after being duly signed by an authorized representative of Respondent shall be mailed to the persons above-stated immediately upon receipt thereof, and again on the 60th day thereafter. Proof of such mailings, with the names and addresses of the persons to whom the Notices were mailed, and the date of such mailings, shall be furnished to the Regional Director for Region 2, within 5 days after such Notices are mailed.

14. In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "ISSUED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "ISSUED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix 3

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C.
Mar. 31, 1975

s/ Sidney J. Barban
Sidney J. Barban
Administrative Law Judge

No. 76-363

In the Supreme Court of the United States

OCTOBER TERM, 1976

AMBHU ASSOCIATES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 538 F. 2d 312. The decision and order of the National Labor Relations Board are reported at 218 NLRB 831 (Pet. App. 3a-25a).

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1976. (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations

Act by coercively interrogating, threatening, and discharging an employee because of his union membership and activities.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158(a)), provides, in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

The relevant facts are set forth in detail in the opinion of the Board's Administrative Law Judge (Pet. App. 5a-25a) which was adopted by the Board (Pet. App. 2a), and in the Appendix to the briefs in the court of appeals. In brief, the Administrative Law Judge found the following:

Petitioner Amshu Associates, Inc., is engaged in the construction and operation of apartment developments (Pet. App. 6a-7a). In September 1973 petitioner hired Thomas Hopkins as resident superintendent for Sleepy Hollow Gardens, an apartment development in Spring Valley, New York. Hopkins was hired on the understanding that he and his wife would live in an apartment in the development and would be on call for tenant complaints at all times except his weekly day off. Hopkins and his wife moved into the apartment

shortly after he was hired, and lived there until his discharge in July 1974. (Pet. App. 8a-9a.) In December 1973 and May 1974 Hopkins received raises in pay (Pet. App. 13a; A. 248).[1]

In June 1974 Hopkins complained to petitioner's vice-president, Mark Weidman, that he needed additional help to do his job properly. Weidman responded that petitioner could not afford it. This response induced Hopkins to revive his membership in the Building Service Employees International Union, Local 32E (the "Union") on June 24, 1974. On the same day, the Union sent petitioner a letter demanding recognition at Sleepy Hollow Gardens. (Pet. App. 11a.)

The following day Weidman and the Union attended a representation hearing involving Spring Valley Gardens, an apartment development owned by Spring Valley Associates.[2] At this hearing the Union representative, Kenneth Childers, suggested to Weidman that, since a certification petition had also been filed for Sleepy Hollow Gardens, the two proceedings be held together. When Childers informed Weidman that Hopkins had joined the Union, Weidman responded that he intended to discharge

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[1] "A." refers to the Appendix to the Briefs in the Court of Appeals.

[2] Weidman is also a partner in Spring Valley Associates and executes the labor policy for both Spring Valley Associates and petitioner. Spring Valley Associates and petitioner share the same office and personnel and are owned largely by the same people. On these facts the Board found that petitioner and Spring Valley Associates constitute a single employer within the meaning of Section 2(6) and (7) of the Act. See *Radio & Television Broadcast Technicians Local Union 1264, IBEW* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256.

Hopkins, allegedly because Hopkins had not taken up residence at the development. Childers warned Weidman not to discharge Hopkins. (*Ibid.*)

Several days later Weidman saw Hopkins and said, "I see you joined the [goddamned] union," to which Hopkins assented. Weidman then replied that Hopkins would not be "around here very long." When Hopkins stated that he could not be fired for his union activities, Weidman replied, "Well, we will find some way to get rid of you." (Pet. App. 12a.) On July 8, 1974, petitioner sent Hopkins a letter stating that he was being discharged, allegedly because it had "become apparent that you have no intention of residing in the building" (Pet. App. 17a).

Much of the foregoing was disputed by petitioner at the hearing before the Administrative Law Judge. In particular petitioner claimed that Hopkins was discharged because he and his wife had not taken up permanent residence in the development, that tenants had been complaining that Hopkins was frequently unavailable, and that petitioner had begun seeking a replacement for Hopkins months before he joined the Union. Weidman also denied the remarks to Hopkins in late June.

The disputed issues of fact and conflicting testimony were considered by the Administrative Law Judge and resolved against petitioner. The Administrative Law Judge credited the testimony of Hopkins, his wife and other witnesses that Hopkins and his wife took up residence at the apartment shortly after Hopkins was hired. He found that the instances of Hopkins' unavailability occurred primarily on his days off, and noted that, notwithstanding petitioner's alleged dissatisfaction on this score, Hopkins was given a wage raise in May 1974. On the basis of the testimony of the persons allegedly interviewed to replace Hopkins, the Administrative Law

Judge found that petitioner had not established that it had been seeking a replacement for Hopkins before Hopkins joined the Union. He also credited Hopkins' testimony concerning Weidman's remarks to Hopkins. The Administrative Law Judge concluded that petitioner had violated Section 8(a)(1) and (3) by coercively interrogating, threatening, and discharging Hopkins on account of his union activities, and recommended that petitioner be ordered to cease and desist from these unfair labor practices, to offer to reinstate Hopkins with back pay, and to mail the customary notices. The Board adopted the Administrative Law Judge's findings and ordered the recommended relief, and the court of appeals enforced that order.[3]

ARGUMENT

Petitioner's contention that the Board's finding of unfair labor practices is not supported by substantial evidence is without merit. Petitioner does not dispute that testimony of witnesses and other evidence of record

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[3]With respect to a separate complaint, consolidated with the foregoing proceeding, the Administrative Law Judge also found that Spring Valley Associates had coercively interrogated employee Carr in violation of Section 8(a)(1) and that by virtue of their common operations and personnel Spring Valley Associates and petitioner constitute a single employer within the meaning of Section 2(6) and (7) of the Act. On the Administrative Law Judge's recommendation, however, the Board declined to issue any remedial order with respect to this single incident. Petitioner therefore is not aggrieved by, and hence is without standing to challenge the determinations concerning this incident. 29 U.S.C. 160(f); *International Union, United Automibile, Aerospace & Agricultural Implement Workers of American* v. *Scofield*, 382 U.S. 205, 210; *Deaton Truck Line, Inc.* v. *National Labor Relations Board*, 337 F. 2d 697 (C.A. 5), certiorari denied *sub nom. Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 612* v. *National Labor Relations Board*, 381 U.S. 903. In any event, those determinations are amply supported by the record (Pet. App. 3a, 6a-8a, 12a).

controverted its own denials of coercive and threatening interrogation and the evidence supposedly supporting its alleged reasons for discharging Hopkins. Rather, petitioner claims, in essence, that its evidence and witnesses should have been credited and the contrary evidence and testimony discounted.

It is well established that credibility resolutions are matters for the trier of fact and the Board, and should not be upset in the absence of extraordinary circumstances. See, *e.g.*, *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404; *National Labor Relations Board* v. *Security National Life Insurance Co.*, 494 F. 2d 336 (C.A. 1); *National Labor Relations Board* v. *A & S Electronic Die Corp.*, 423 F. 2d 218 (C.A. 2), certiorari denied, 400 U.S. 833. No such circumstances are present here. The Administrative Law Judge carefully considered all of the conflicting evidence, and his resolution of the credibility issues and his conclusions from the evidence are amply supported by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
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JOHN S. IRVING,
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National Labor Relations Board.

NOVEMBER 1976.

DOJ-1976-11